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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOYCE McCLARAN, Director, Child Support Services, Tennessee Department of Human Services,

Petitioner,

v.

PATRICIA DAVIS, ELLA LARITA LILLARD, PATRICIA NORTHCUTT, and MARIETTA TURNER, on their own behalves and on behalf of all persons similarly situated,

Respondents.

On Petition for Writ of *Certiorari* to the Supreme Court of Tennessee

BRIEF OF *AMICI CURIAE* THE STATES OF ILLINOIS, ARIZONA, COLORADO, DELAWARE, FLORIDA, HAWAII, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, NORTH DAKOTA, OREGON, UTAH, AND VERMONT IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The *amici curiae* States of Illinois, Arizona, Colorado, Delaware, Florida, Hawaii, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oregon, Utah, and Vermont, submit this brief pursuant to Supreme Court Rule 37 in support of the State of Tennessee requesting that a Writ of Certiorari be granted to review the judgment entered by the Supreme Court of Tennessee in *Davis v. McClaran*, 909 S.W. 2d 412 (Tenn. 1995).

The courts are divided on the issue of whether individuals may bring actions against state actors pursuant to 42 U.S.C. §1983 to enforce claims to child support services allegedly conferred by Title IV-D of the Social Security Act, 42 U.S.C. §651 *et seq.*[1] The *Davis* court found

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[1] In the broadest formulation, the following cases have held that Title IV-D creates enforceable rights and that §1983 is available to challenge a state's IV-D program. *Albiston v. Maine Commissioner of Human Services*, 7 F.3d 258 (1st Cir. 1993); *Davis v. McClaran*, 909 S.W.2d 412 (Tenn. 1995). See also *Freestone v. Cowan*, 68 F.3d 1141 (9th Cir. 1995); *Howe v. Ellenbacher*, 8 F.3d 1258 (8th Cir. 1993); *Behunin v. Jefferson County Dept. of Social Services*, 744 F.Supp. 255 (D. Colo. 1990). But compare the following cases holding that Title IV-D does not create enforceable rights. *Wehunt v. Ledbetter*, 875 F.2d 1558 (11th Cir. 1989); *Mason v. Bradley*, 789 F. Supp. 273 (N.D. Ill. 1992); *Oliphant v. Bradley*, No. 91 C 3055, 1992 WL 153637 (N.D. Ill. Feb. 19, 1992). At least one court has adopted a middle of the road position, finding that enforceable rights exist, but limiting use of §1983 to actions to improve the state's IV-D performance to a level of substantial compliance. *King v. Bradley*, 829 F. Supp. 989 (N.D. Ill. 1993). See also *Carelli v. Howser*, 923 F.2d 1208 (6th Cir. 1991) (finding the existence of enforceable rights but abstaining from hearing IV-D challenge in light of Secretary's remedial actions). The

(continued...)

that an individual plaintiff may bring an action pursuant to §1983 to enforce rights created not by federal statute but by federal regulation. The Tennessee Supreme Court decision, and the other cases which are in accord, substantially broaden the scope of state liability under §1983 by allowing courts to find that federal regulations *ab initio* create enforceable rights to sue state actors in federal court.

The decision of the Tennessee Supreme Court, if followed by other courts, will dramatically alter the states' responsibilities for child support enforcement. The mandate of Title IV-D, and the responsibilities which the states undertake as part of their contractual relationship with the federal government, is that the states operate a child support enforcement program which is in "substantial compliance" with federal regulations. 42 U.S.C. §602 (a) (27).

In the particular context of cases finding that individuals have enforceable rights to sue for violations of child support enforcement regulations, there will be an increased burden on the federal courts, since any individual who claims not to have received some child support enforcement service will have the ability to bring an action in federal court. The state IV-D agencies, and the state courts, would be subject to varying orders from state and federal courts to "hurry up" or to engage in a court-created process in each of these individual cases. There would be a concomitant increase in each state's

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[1] (...continued)
State of Arizona plans to file a petition for writ of certiorari in *Freestone v. Cowan*, 68 F.3d 1141 (9th Cir. 1995), within the next few weeks.

cost of providing child support enforcement services. Ultimately, this would divert fiscal resources from the actual collection of child support and impose enormous financial and programmatic burdens on state IV-D programs. This ruling would open the door for multitudinous suits to determine individual rights created by federal regulation.

SUMMARY OF ARGUMENT

At issue before this Court is the ruling of the Tennessee Supreme Court holding that a plaintiff may bring an action pursuant to §1983 for individual relief to enforce the State's "direct obligations" to that plaintiff under Title IV-D, and that this right exists even if the State is in "substantial compliance" with the requirements of Title IV-D. The lower courts are in conflict as to the availability of a §1983 action to enforce regulations promulgated under Title IV-D. The enforceable rights analysis of the Tennessee Supreme Court reflects a disregard of the governing principles expressed by this Court in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and *Suter v. Artist M.*, 503 U.S. 347 (1992). Moreover, the Tennessee Supreme Court failed to consider whether plaintiffs had sustained a personal injury that would likely be redressed by the requested relief. The *Davis* court failed to examine whether there is a nexus between the state's alleged failure to operate a IV-D program in substantial compliance with federal law and plaintiffs' failure to receive child support from absent parents.

ARGUMENT

I.

THE TENNESSEE SUPREME COURT'S ENFORCEABLE RIGHTS ANALYSIS IS FLAWED. CONGRESS NEVER INTENDED TITLE IV-D OF THE SOCIAL SECURITY ACT TO CREATE ENFORCEABLE RIGHTS TO CHILD SUPPORT ENFORCEMENT SERVICES.

Legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the states agree to comply with certain unambiguous conditions. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (hereafter "*Pennhurst*"); *Suter v. Artist M.*, 503 U.S. 347, 356 (1992). Accordingly, unless states voluntarily and knowingly agree to spend state money to uphold new rights as a condition of receiving federal funds, courts cannot use §1983 to require states to fund new rights. *Pennhurst*, 451 U.S. at 17-18.

In the statutory scheme of child support enforcement, Congress unambiguously stated that it will suspend a state IV-D program's federal funding only if, as a result of an audit conducted pursuant to 42 U.S.C. §652(a) (4), the Secretary of Health and Human Services finds the program "not to have complied substantially" with the requirements of Title IV-D and its implementing regulations. 42 U.S.C. §603 (h) (1). Furthermore, Congress insisted that a state lose its federal funding only if that state refuses to undertake necessary changes to correct its child support enforcement program once the Secretary makes a finding that the program fails to substantially comply with Title IV-D. S. Rep. No. 98-387, 98th Cong., 2d Sess. 33, *reprinted in* 1984 U.S.C.C.A.N. 2429.

In *Davis*, the Tennessee Supreme Court held that §1983 can be used to force states to achieve a higher

level of compliance with Title IV-D than required to receive federal funding. *Davis*, 909 S.W.2d at 420. By defining the rights that Congress allegedly created in enacting Title IV-D without regard to the contractual relationship between the state and the federal government as delineated by the clear and unambiguous language of the statute, the Tennessee Supreme Court failed to properly analyze whether Title IV-D creates enforceable rights.

In 1984, Congress by statute delegated authority to the Secretary to define what level of performance was required to comply substantially with the federal mandate to operate an effective and efficient IV-D program. In response, the Secretary by regulation added new program performance indicators to the IV-D internal enforcement scheme. The new indicators were designed to compel states to achieve both AFDC cost recovery and welfare cost avoidance by non-AFDC collections, and to set minimum cost-effectiveness standards for state IV-D operations. 45 C.F.R. §§305.20(a), 305.98. At the same time, the Secretary of Health and Human Services developed new program compliance criteria to define "substantial" compliance, as required by the statutory amendment. 42 U.S.C. §603(h) (1).

The Secretary has set a 75% substantial compliance standard by regulation. There has been no legislative response which would require any different or higher substantial compliance standard. This is strong evidence that Congress did not intend to confer an individual enforceable right to IV-D services which comply with federal requirements.

The 75% audit compliance requirement reflects that neither the Secretary nor Congress expects the states to run perfect child support enforcement programs. The

Secretary recently promulgated new regulations redefining substantial compliance to place greater focus on performance and outcomes. 45 C.F.R. §§303, 305. These amendments were made in part to emphasize that what was most important was the collection of child support payments. *See* Child Support Enforcement Program: Paternity Establishment and Revision of Child Support Enforcement Program and Audit Regulations, 59 Fed. Reg. 66204, 66244-66245 (1994); 45 C.F.R. §305.20(a)(4). This illustrates the evolving nature of federal oversight of the states' child support enforcement efforts. The Secretary, without need for congressional approval, makes changes in what is required for states to be in substantial compliance based on her experience in administering the program.

The Tennessee Supreme Court held that "a plaintiff may bring an action pursuant to §1983 to enforce the state's 'direct obligations' to him or her under Title IV-D; and that this right is not dependent upon whether the State is in 'substantial compliance' with the requirements of Title IV-D for purposes of the Secretary's audit." *Davis v. McClaran*, 909 S.W.2d 412, 420 (1995). These "direct obligations" are found only in regulations promulgated by the Secretary.

The concerns of the dissent in *Wright v. Roanoke* apply squarely to this case:

> I am concerned, however, that lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, *any* regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result.

Wright v. Roanoke, 479 U.S. 418, 438 (1987) (O'Connor, J., dissenting) (emphasis in original). The *Davis* decision creates rights never intended by Congress or the Secretary.

If Title IV-D creates enforceable rights, they are unique and novel. Such "rights" would not be created by Congress at all, but by the Secretary of Health and Human Services in the regulations defining substantial compliance, which may set any reasonable compliance level consistent with the statutes and their goals. Under the Tennessee Supreme Court's decision, the Secretary would be given the power to create and to extinguish federal rights.

II.

THE TENNESSEE SUPREME COURT FAILED TO ANALYZE WHETHER CUSTODIAL PARENTS HAVE STANDING TO SUE FOR AN ALLEGED VIOLATION OF TITLE IV-D REQUIREMENTS.

Article III limits resolution of alleged violations of federal rights to litigants who have standing.

> The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy."

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982), *quoting Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892). Plaintiffs have standing

only if they allege that they have suffered a personalized injury fairly traceable to the defendant's allegedly unlawful conduct that is likely to be redressed by the requested relief. *Id.* The Tennessee Supreme Court wholly failed to consider whether plaintiffs had standing.

The party invoking federal jurisdiction bears the burden of establishing that the constitutional elements of standing have been met. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). One of the essential elements of standing is that the plaintiff must show that there is a causal connection between his injury and the conduct complained of. *Id.* at 560. The United States Court of Appeals for the Eleventh Circuit has reasoned that the nexus between custodial parents' injury and the child support enforcement program's failure to comply with Title IV-D is "attenuated at best since the injury is directly caused by a third party who is not a party to the lawsuit, namely the absent father." *Wehunt v. Ledbetter*, 875 F.2d 1558, 1567 (11th Cir. 1989).

Similarly, the *Wehunt* court also found that there was a clear lack of redressability because, as plaintiffs conceded, "even rigorous enforcement of child support laws does not guarantee that any father will be located and if so that any child support will be collected." *Wehunt*, 875 F.2d at 1567. Where a plaintiff's injury arises from the government's allegedly unlawful failure to control the behavior of third parties not before the court, establishing causation is nearly impossible. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). *See also Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

The Tennessee Supreme Court failed to examine whether there is a nexus between the defendant's alleged failure to operate a IV-D program in substantial compliance with federal law and plaintiffs' failure to receive child support from absent parents. It should be clear, though, that it is wholly speculative as to whether plaintiffs' situations will improve with the Tennessee Supreme Court having ruled in their favor. This Court should grant the Petition in order to affirm that standing is a threshold requirement that all litigants must meet.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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